

## PENALTY, HARM AND THE COMMUNITY: WHAT ROLE NOW FOR VICTIM IMPACT STATEMENTS IN SENTENCING HOMICIDE OFFENDERS IN NSW?

TRACEY BOOTH\*

### I INTRODUCTION

In homicide matters,<sup>1</sup> victim impact statements ('VISs') from members of the deceased's family providing details of the impact of the deceased's death upon them are a well-established feature of the sentencing of homicide offenders in New South Wales. Whilst a sentencing court is required to both *receive* and *acknowledge* a VIS from a family victim and perhaps comment on it if it chooses to do so,<sup>2</sup> by virtue of section 28(4)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('CSPA'), the court must not consider a VIS submitted by a family victim<sup>3</sup> 'in connection with the determination of punishment for the offence unless it considers that it is appropriate to do so'. To date, the NSW Supreme Court has declined to take VISs from family victims into account for the purposes of sentencing on the basis that it is not appropriate to do so.<sup>4</sup> New South

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\* Senior Lecturer, University of Technology, Sydney. Much of the research for this article was completed whilst I was a Visiting Fellow at the Centre for Sentencing Research at the University of Strathclyde in 2006 and I would like to acknowledge the hospitality and support of the Centre, especially Dr Cyrus Tata. A very early version of this article was presented to the *Sentencing: Principles, Perspectives and Possibilities Conference* in Canberra in February 2006 and I thank the conference participants, particularly Richard Refshauge SC, ACT Director Public Prosecutions, for their insightful comments. Finally, I thank the anonymous reviewers and Professor David Brown for their valuable feedback.

1 Homicide matters include offences where death of the primary victim is an essential element. Such offences include: murder, manslaughter, driving offences causing death and death resulting from an offence against Division 1 of Part 2 of the *Occupational Health and Safety Act 2000* (NSW).

2 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3).

3 Under s 26 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a 'family victim' is a member of the primary victim's immediate family who is defined as:

- a) the victim's spouse; or
- b) the victim's de facto spouse or same-sex partner, being a person who has cohabited with the victim for at least two years; or
- c) a parent, grandparent, guardian or step-parent of the victim; or
- d) a child, grandchild or step-child of the victim or some other child for the whom the victim is guardian; or
- e) a brother, sister, half-brother, half-sister, step-brother or step-sister of the victim.

4 *R v Previtera* (1997) 94 A Crim R 76 ('Previtera'); *R v Bollen* (1998) 99 A Crim R 510; *R v Dang* [1999] NSWCCA 42.

Wales is the only Australian jurisdiction that does not take account of VISs from family victims in sentencing homicide offenders.

Section 3A, which was inserted into the *CSPA* in 2002, articulates the purposes for which a court may impose a penalty. Reflecting the well-documented rise in interest in the victims of crime by politicians, the sentencing purpose set out in section 3A(g) requires recognition of the harm caused to the victim and the community. In the light of this provision and the different approaches of other Australian jurisdictions, the NSW Court of Criminal Appeal has indicated that it may be time to reconsider the role of VISs from family victims in sentencing.<sup>5</sup>

This article aims to explore the role of VISs from family victims in sentencing homicide offenders in NSW in light of the combined effect of sections 3A(g) and 28(4)(b) of the *CSPA* and the different approaches of other common law jurisdictions. In particular, the article will address whether it is indeed appropriate to take account of VISs from family victims in sentencing homicide offenders. Part II outlines the current role of VISs from family victims in sentencing homicide offenders in NSW and the blanket prohibition approach adopted in regard to those VISs by the Supreme Court. The impact of section 3A(g) of the *CSPA* on the current law is considered in Part III. Part IV examines alternative approaches of various Australian and international jurisdictions to the use of victim impact evidence from family victims in sentencing homicide offenders. Ultimately, whether or not the rule in *Previtera* should be abrogated or qualified depends on the legislative proviso: is it appropriate for the sentencing court to take account of victim impact evidence in sentencing? In Part V it will be argued that whilst it is proper that the ultimate penalty should reflect harm to both the deceased victim and the community (including the more intimate community of the deceased) it is nevertheless not required nor is it appropriate to take account of VISs from family victims in sentencing homicide offenders. This part will focus on the use of VISs to establish aggravating sentencing factors and public policy concerns generally.

## II VICTIM IMPACT STATEMENTS FROM FAMILY VICTIMS IN NSW

### A Current Practice in NSW

Prior to the passing of the *Victims Rights Act 1996* (NSW), there was no statutory basis for the submission of VISs in NSW. In 1987, section 447C was inserted into the *Crimes Act 1900* (NSW) to provide for the submission of written VISs in the context of particular offences to the sentencing court,<sup>6</sup> but this section

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5 *R v Berg* [2004] NSWCCA 300, [42]-[45]; *R v FD*; *JD* (2006) 160 A Crim R 392; *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* [2002] NSWCCA 515, [57]-[59]; *R v Tzanis* [2005] NSWCCA 274, [15].

6 Only primary victims (those persons against whom the offence was committed) or witnesses to the offence were victims who could submit a VIS. Family victims were excluded from the legislation. Offences for which a VIS could be submitted were limited to indictable offences involving an act of actual or threatened violence.

remained unproclaimed. Consequently, the admissibility and use of VISs by sentencing courts were governed by the common law, the *Charter of Victims Rights* and the Director of Public Prosecutions Policy and Guidelines.<sup>7</sup> On this basis, VISs submitted in cases relating to sexual assault and child sexual abuse seemed to be an established sentencing practice in NSW before 1996.<sup>8</sup>

However, consideration of VISs from members of the deceased's family in homicide cases has proven more controversial. Generally, VISs from family victims were regarded as inadmissible in the sentencing of homicide offenders because it was considered that such evidence did not disclose information that was relevant to the sentencing of offenders in homicide cases.<sup>9</sup> When sentencing the offender for murder in *R v de Souza*,<sup>10</sup> the Court refused to accept a number of VISs from members of the deceased's family tendered by the Crown. It was held that the VISs detailing the impact of the deceased's death were not relevant to an assessment of the objective seriousness of the offence because those circumstances were measured by the death and the manner and circumstances of the death of the primary victim.

Despite recommendations of the NSW Law Reform Commission in 1996 that VISs from family victims should be inadmissible in homicide cases,<sup>11</sup> section 23C was inserted into the *Criminal Procedure Act 1986* (NSW) in 1997. By virtue of this provision, family victims were given the right to submit a written VIS to the court between conviction and sentence, detailing the impact of the primary victim's death upon members of the deceased's family. However, whilst the sentencing court was required to both *receive* and *acknowledge* a VIS from a family victim, the court was not compelled to consider that VIS in connection

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7 The *Charter of Victims Rights* had no statutory base and was produced by the NSW Liberal Government in 1989. Article 17 provided: 'The NSW Government recognises the rights of victims of crime in matters relating to charges of sexual assault or other serious personal violence, to have the prosecutor make known to the court the full effect of the crime upon them.' Guideline 15 of the NSW DPP Prosecution Policy and Guidelines provided:

In preparing cases involving charges of personal violence, including sexual assault, a statement would be obtained, with the consent of the victim (or if the victim is less than 12 years old the consent of the parent or guardian) from an appropriate person evaluating the impact of the offence involved on any victim. When presenting evidence before the Court on the question of sentence, evidence of the effects of the offence should be tendered to the Court. If this evidence does not form part of the committal papers a copy of the statement should be provided to the defence as soon as possible.

8 NSW, *Victim Impact Statements*, Parl Paper No 7 (1995). For a range of cases where VISs were submitted and accepted by the sentencing court see *R v Cowan* [1990] NSWCCA 60105 (Unreported, Hunt, Finlay and Allen JJ, 15 February 1990); *R v Deas* [1990] NSWCCA 60519 (Unreported, Kirby CJ, Wood and Badgery-Parker JJ, 16 March 1990); *R v Waters* [1990] NSWCCA 60195 (Unreported, Gleeson CJ, Handley JA and Studdert J, 19 October 1990); *R v Muldoon* [1990] NSWCCA 60513 (Unreported, Hunt, Enderby and Grove JJ, 13 December 1990); *R v King* [1991] NSWCCA 60240 (Unreported, Hunt, Badgery-Parker and Abadee JJ, 20 August 1991); *R v Nichols* (1991) 57 A Crim R 391; *R v Bielaczek* [1990] NSWSC 70212 (Unreported, Badgery-Parker J, 19 March 1992); *R v PJP* [1992] NSWCCA 60025 (Gleeson CJ, Carruthers and Smart JJ, 9 July 1992); *R v Drayton* [1994] NSWCCA 60335 (Unreported, Grove and Newman JJ, 12 October 1994); *R v Gebrail* [1994] NSWCCA 60289 (Unreported, Mahoney JA, Newman and James JJ, 18 November 1994); *R v Norris* [1994] NSWCCA 60370 (Unreported, Priestley JA, Newman J and Barr AJ, 23 October 1995).

9 See, eg, *R v de Souza* (Unreported, NSW Supreme Court, Dunford J, 10 November 1995).

10 (Unreported, NSW Supreme Court, Dunford J, 10 November 1995).

11 NSW Law Reform Commission, *Sentencing*, Report No 79 (1996).

with the determination of penalty unless it considered it *appropriate* to do so. A late amendment, section 23C was the product of intense lobbying by family victims and was included to ensure that a sentencing court could no longer reject a VIS submitted by a family victim.<sup>12</sup>

Shortly after enactment, Hunt CJ at CL considered this provision in *Previtera*<sup>13</sup> when sentencing the offender for murder. At the sentencing stage, the Court received a VIS authored by the deceased's son which gave details of the reactions of the son and his sister to the murder of their mother in terms Hunt CJ described as 'moderate and compassionate'.<sup>14</sup> As required by the legislation, Hunt CJ acknowledged receipt of the VIS and extended his sympathy to the family victims 'for their tragic and senseless loss'.<sup>15</sup> However, his Honour found that it could never be appropriate to take a VIS from a family victim into account in sentencing if that VIS dealt only with the effect of the death upon the victim's family.

Reasons for resistance to taking account of VISs from family victims were largely twofold. First, according to Hunt CJ at CL, only the consequences upon the victim directly injured by the crime (the deceased victim in a homicide case) form part of the objective circumstances of the offence and are relevant to sentencing. Only in 'rare' cases might a VIS from a family victim provide relevant information to a sentencing court such as details of the slow, lingering death of the deceased as a result of the offence. This type of information would relate directly to the manner and circumstances of the death.<sup>16</sup> In his Honour's view, VISs from family victims concerned simply with the impact of the deceased's death on the family were only relevant to civil issues of compensation and not punishment. On this point his Honour said:

There is a fundamental difference – both in law and in common sense – between punishing the offender for his crime and compensating the victim and others affected by that crime for their loss or injury suffered as a result of that crime. The task of the criminal court in imposing a sentence is to punish; it is not to compensate.<sup>17</sup>

Second, if sentencing judges do take account of victim impact evidence from family victims, the resulting penalty might reflect not the culpability of the offender but instead the value and worthiness of the deceased person. The more valuable and worthy the deceased, the greater the impact of the death on the deceased's family, the greater the harm caused by the offence and, the greater the penalty imposed. In such circumstances Hunt CJ at CL said that 'it would ... be

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12 Section 23C was an amendment moved by John Tingle. Some years later he explained that he originally moved this amendment as a result of the particular experience of one parent, Ken Marslew, the founder of the victim support group, *Enough is Enough*, whose son was killed during an armed hold-up. During the course of the sentencing hearing, Mr Marslew sought to hand up a VIS to the judge on three separate occasions 'pointing out that the murder had damaged him, ruined his marriage and caused great stress to the family and on three occasions the presiding judge refused to accept it': New South Wales, *Parliamentary Debates*, Legislative Council, 28 May 2003, 1239 (John Tingle).

13 (1997) 94 A Crim R 76.

14 Ibid 85.

15 Ibid 84.

16 Ibid 86.

17 Ibid 85.

wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in the one case than it is in the other'.<sup>18</sup>

Research indicates that the effect of a homicide offence on members of the deceased's family extends over a wide range of harms but overwhelmingly the impact of the deceased's death on the family victim results in varying degrees of emotional and psychological suffering.<sup>19</sup> Given that the degree of emotional suffering will reflect the value and worthiness of the deceased to the family victim, the sentencing court, in taking account of the harm sustained by the family victim, will effectively be required to evaluate the life of the deceased. Justice Adams explained the problem succinctly in *R v Dang*:<sup>20</sup>

Assume the deceased was friendless; assume the deceased had no family. It would be monstrous to suggest that that meant for some reason killing her should attract a lesser penalty than would be the case if, as is the situation here, she had a loving family and grieving relatives. Essentially then, the reason that victim impact statements in cases involving death are not taken into account in imposing sentence is that the law holds, as it must, that in death we are all equal and the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law.<sup>21</sup>

In 1999, the VIS provisions analysed in *Previtera* were reformatted and incorporated in the *Crimes (Sentencing Procedure) Act 1999* (NSW). Notwithstanding Chief Justice Hunt's criticism of the poor drafting of section 23C, the terminology remained substantially the same and is now located in section 28(4)(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Thus, the rule in *Previtera* continues to apply in NSW. Current sentencing practice is to generally acknowledge VISs submitted by family victims in varying detail, extend sympathy to those victims, but then to note the limitations on the use of the VISs in sentencing.<sup>22</sup> For instance, Whealy J in *R v Sandra Cavanough* said of the VISs submitted in that case:

As might be expected [the VISs] confirm that the death of the deceased has had a very significant and distressing effect on all members of his family. ... I would like, on behalf of the Court, to extend to the Day family and to each and every member of that family, my deep sympathy for the sad situation in which they find themselves. ... As I indicated during argument with counsel, however, I am bound to say that I do not consider it appropriate to have regard to the statements in the determination of sentence imposed.<sup>23</sup>

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18 Ibid 86-87.

19 Tracey Booth, 'Voices after the Killing: Hearing the Stories of Family Victims in New South Wales' (2001) 10(1) *Griffith Law Review* 25.

20 [1999] NSWCCA 42 ('*Dang*').

21 Ibid [25].

22 See, eg, *R v White* [2005] NSWSC 667; *R v Hillsley* [2005] NSWSC 652; *R v Goodwin* [2004] NSWSC 757; *R v Hamoui (No 4)* [2005] NSWSC 279; *R v Vuni* [2005] NSWSC 184; *R v Ward* [2005] NSWSC 266; *R v MAH* [2005] NSWSC 871.

23 [2007] NSWSC 561, [41].

## B The Blanket Prohibition Approach

For the purposes of this article, the approach of the NSW Supreme Court where it refuses to take account of VISs from family victims in sentencing will be referred to as the 'blanket prohibition' approach. There is no doubt that the arguments of the NSW Supreme Court supporting its approach explored in Part II of this article are compelling. Echoing the concerns of the courts in *Previtera* and *Dang*, Sebba warns that taking account of victim impact evidence from family victims could result in a distinction between 'worthy' and 'unworthy' victims and perhaps negate equal protection of victims.<sup>24</sup> Inevitably, he points out that

[p]resentation of victim attributes as part of the sentencing process will in fact result in differential sentencing. It will lead to a new extension of the 'moral accounting' which in the past was applied to the defendant in the context of individualised sentencing. ... If in the past the offender's good character would have resulted in a reduced sentence, now the victim's good character will enhance it.<sup>25</sup>

However, the assumption in *Previtera* that differentiating between deceased victims for the purpose of sentencing is contrary to concepts of equality and justice bears closer scrutiny. Existing sentencing principles establish that penalties may be aggravated according to the status of particular victims. The common law has traditionally recognised crimes involving victims who are 'vulnerable' (for example by reason of age or a disability) as being more serious and attracting more severe sentences. Modern statutory sentencing models also reflect policy trends to impose greater penalties according to the status of a victim. For instance in NSW, the penalty may be aggravated in cases where the victim is of a certain status such as police officer, emergency services worker, correctional officer, health worker, teacher, community worker or judicial officer.<sup>26</sup>

Intuitively, not all crimes are the same. For example, some in our community would argue that the murder of a person knowing the deceased to be a heart transplant surgeon is a worse crime than killing an anonymous citizen because of the loss to the community generally and the penalty imposed on the offender for killing the heart surgeon should be higher than that imposed on the offender who kills an anonymous citizen. Sebba characterises this approach as a form of 'social accounting' rather than 'moral' accounting and in line with current policy to single out particular victims in sentencing.<sup>27</sup> But this is not to say that it is value-free; who is to decide the social value of particular victims? By way of illustration, Sebba asks: what would be the social value of a newspaper tycoon or a political revolutionary?<sup>28</sup>

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24 Leslie Sebba, 'Sentencing and the Victim: the Aftermath of Payne' (1994) 3 *International Review of Victimology* 141, 155.

25 Ibid 154.

26 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (2)(a).

27 Sebba, above n 24.

28 Ibid 155.

On the other hand, Wasik describes this process as embodying a degree of moral accounting because it involves a comparison and contrast of the respective merits of the victim and offender.<sup>29</sup> However, he argues that it would probably be widely agreed that an offence targeted at an elderly or very young person is especially culpable and should attract additional punishment where no greater than average harm is incurred.<sup>30</sup> In his view, the gravamen of the penalty imposed in such cases is the culpability of the offender (who targets such victims aware of their particular vulnerability or status) rather than the harm that has occurred to the victim and, in this way, the status and characteristics of the victim are rendered less important.<sup>31</sup>

The NSW Court of Criminal Appeal's decision in *R v Lewis*<sup>32</sup> provides an interesting example of Wasik's argument. In that case, the Court of Criminal Appeal found that the homicide offender knew the deceased's death would deprive five children of their mother. The offender argued that if this knowledge affected his culpability it would have a capricious effect – a person would be less culpable if killing strangers about whom a person knew nothing than when killing a person of whom the offender had knowledge. However, according to the Court, although *Previtera* was authority for the proposition that the effect on family victims was not relevant to culpability, the harm that one *knows* will be caused by one's actions is relevant to culpability and therefore to penalty.<sup>33</sup> A VIS relating the impact of that deceased's death upon members of the deceased's family is not necessary to inform the sentencing court in this regard.

Whereas culpability (and therefore penalty) can vary according to the status of the victim in particular circumstances, the premise in *Previtera* that differentiating between deceased victims for the purpose of determining the extent of harm caused by the offence in sentencing is contrary to concepts of equality and justice remains sound. The NSW Supreme Court's argument on this point is compelling: taking account of specific harm sustained by individual family victims when sentencing homicide offenders has the potential to produce penalties that reflect the value and worthiness of the deceased victim rather than the culpability of the offender. Such consequences would be contrary to current sentencing principles and facilitate unjust sentencing process and results.

### **III RECOGNISING HARM TO THE VICTIM AND COMMUNITY IN SENTENCING HOMICIDE OFFENDERS AND THE IMPACT OF SECTION 3A(G) OF THE *CRIMES* (*SENTENCING PROCEDURE*) ACT 1999 (NSW)**

In 2002, when hearing an application for a guideline judgment for the offence of 'assault police' under section 60(1) of the Crimes Act 1900 (NSW),

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29 Martin Wasik, 'Crime Seriousness and the Offender – Victim Relationship in Sentencing' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory* (1998) 113.

30 Ibid 115.

31 Ibid.

32 [2001] NSWCCA 448.

33 Ibid [67].

Spigelman CJ observed that it was arguable that some of the 'purposes of sentencing' set out in section 3A of the *CSPA* constituted a 'change of pre-existing sentencing principle'.<sup>34</sup> In particular he noted that the purpose set out in section 3A(g), requiring the court to recognise harm done to the community, may introduce a new element into the sentencing task.<sup>35</sup> The Chief Justice expanded on this theme in *R v Berg*<sup>36</sup> where he observed that

the reasons given in *Previtera* may need to be reconsidered in an appropriate case ... it appears to me strongly arguable that the recognition of this purpose of sentencing [ie harm to the community] would encompass the kinds of matters which are incorporated in a victim impact statement. It may in some cases be appropriate to consider the contents of such statements in the sentencing exercise. This was not a purpose of sentence recognised by Hunt CJ at CL in *Previtera*.<sup>37</sup>

In *R v Tzanis*,<sup>38</sup> the NSW Court of Criminal Appeal sat as a bench of five judges to reconsider the approach in *Previtera*. The applicant had appealed against the severity of a sentence in regard to convictions of dangerous driving occasioning death in breach of section 52(A)(1)(c) of the *Crimes Act 1900* (NSW) and dangerous driving occasioning grievous bodily harm in breach of section 52(A)(3)(c) of that Act. One ground of appeal was that the trial judge had erred having regard to the aggravating factor set out in section 21A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), that is the 'injury, emotional harm, loss or harm caused by the offence was substantial'. The applicant argued that the trial judge could not take account of this aggravating factor with regard to the two offences because a death was an essential element of the first and grievous bodily harm was an element of the second. In the case of death, the injury was already 'substantial' and a necessary element of the offence. According to section 21A(2), that element could not be counted again as an aggravating factor. With respect to the grievous bodily harm, the seriousness of the injury was already relevant to the objective gravity of the offence. According to the NSW Court of Criminal Appeal, the trial judge's reference to 'harms' could not be understood as a reference exclusively, if indeed at all, to the harm caused to the family victims whose VISs were submitted to the sentencing court. By using the plural 'offences', Spigelman CJ found that the trial judge was referring to both offences and that this indicated that he had erroneously, with respect to the offence causing death, taken the death into account as an aggravating factor. Furthermore, the Court noted that there was no VIS submitted with respect to the second offence dealing with grievous bodily harm. In these circumstances, although the Court had been ready to hear argument on the question, the issue of the authority of *Previtera* was not decided.

It is strongly arguable that the requirement of recognising harm to the community did not introduce a new element into the task of sentencing homicide

34 *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* [2002] NSWCCA 515, [57].

35 *Ibid.*

36 [2004] NSWCCA 300 [43].

37 Although *R v Berg* involved a driving offence causing death, it was not an appropriate case to decide this issue because no VIS had been submitted by a family victim.

38 [2005] NSWCCA 274.



offenders because it was already part of the common law. In *R v MA*<sup>39</sup>, Dunford J (with whom Studdert and James JJ agreed) said that section 3A was ‘in substance a codification and elaboration of the purposes of criminal punishment described in *Veen v R (No 2)*’.<sup>40</sup> In *Veen*, Mason CJ, Brennan, Dawson and Toohey JJ said:

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.<sup>41</sup>

The NSW Court of Criminal Appeal has also acknowledged the importance of recognising the harm caused to the community in sentencing. In *R v Palu*,<sup>42</sup> Howie J (with whom Levine and Hidden JJ agreed) said:

A serious crime is a wrong committed against the community at large and the community itself is entitled to retribution. ... Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim.<sup>43</sup>

It is also arguable that Hunt CJ at CL in *Previtera* did not overlook harm to the community as he determined the penalty. During the course of his judgment, his Honour said that it was important

[t]hat the sentences imposed by the criminal courts are acceptable to the community (including the victims and others affected by the crime), important that those sentences are such as to demonstrate to the community that the offender has been given his just desserts ... that justice has been done.<sup>44</sup>

Furthermore, his Honour pointed out that the very nature of the offence of murder recognises the harm caused to the community by a killing:

The law already recognises without specific evidence, the value which the community places upon human life; that is why unlawful homicide is recognised by the law as a most serious crime, one of the most dreadful crimes in the criminal calendar.<sup>45</sup>

The common law dictates that human life is protected by the principle of the sanctity of life and is so protected by virtue of the value that our community places on all human life. The loss of a life leaves the deceased’s family and the wider community bereft; the death does not occur in a vacuum and it is proper and logical that the penalty imposed should reflect the broader impact of an offence on the community.

Therefore, it is arguable that the words of the provision do not introduce a new sentencing element. Nor is there compelling evidence to suggest that it was Parliament’s intention that the effect of section 23A(g) should be that VISs from family victims were relevant to the determination of penalty in homicide cases.

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39 (2004) 145 A Crim R 434.

40 *R v MA* (2004) 145 A Crim R 434, [23]; referring to *Veen v R (No 2)* (1998) 164 CLR 465 (*‘Veen’*).

41 (1988) 164 CLR 465, 476.

42 [2002] NSWCCA 381.

43 *Ibid* [37].

44 *Previtera* (1997) 94 A Crim R 76, 86.

45 *Ibid* 86.

Certainly the Attorney-General's frequent references to *Veen* and the common law in his reading speech for the Bill indicates that Parliament did not intend to change the law.<sup>46</sup> Nor is there compelling evidence to suggest this is the case. At the outset when section 3A was inserted into the *CSPA*, the provisions regarding the submission of VISs by family victims remained substantially unaltered. Nor did the Attorney-General discuss the impact of the amendments on the role of VISs from family victims in the sentencing process in his reading speech for the Bill. Given a political climate that features victims of crime prominently in criminal justice policy, Parliament would be expected to state explicitly if any change in the existing law was intended to affect crime victims; that the Attorney-General did not do so strongly suggests the absence of intention to change current sentencing practice in NSW. Support for this contention can be found in Hulme J's comments in *R v FD; R v FD; R v JD*:

[t]here is a deal to be said for the view that, had Parliament intended to make the radical change in the law, particularly in cases involving death ... one would have expected it to say so much more clearly than by general terms it has used.<sup>47</sup>

Furthermore, although Parliament has had ample notice of the ruling in *Previtera* and the consistent approach of the NSW sentencing courts to VISs from family victims during the past decade, at no stage has it taken the opportunity to amend the substance of the provisions regulating the role of VISs in sentencing. Despite various procedural and evidential amendments to the VIS provisions over the years,<sup>48</sup> the essential wording of the provision regarding the status of VISs from family victims in sentencing remains unchanged and it continues to be a matter for judicial discretion as to whether it is appropriate to take account of VISs from family victims in the determination of penalty.

Therefore, it is contended that there is no clear legislative intention to change the law and overrule *Previtera*, nor do the words of the provision suggest a change to the role of VISs from family victims in sentencing homicide offenders or, indeed specifically, how those VISs are to be treated in the sentencing process. However, if this conclusion is found to be wrong, nevertheless any abrogation or qualification of the rule in *Previtera* has to take account of section 28(4)(b) of the *CSPA*. Accordingly the question becomes: is it *appropriate* for a

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46 New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002 (Bob Debus, Attorney General).

47 (2006) 160 A Crim R 392, 429.

48 Amendments with regard to VISs from family victims since 1997:

- 1998 – Jurisdiction extended to District, Children's and Local Court to receive VISs in death cases and category of cases of offences in respect of which a VIS may be submitted extended to specifically include driving offences causing death;
- 2000 – VIS to be made available to offender, prosecutor or any other person on conditions court considers appropriate;
- 2001 – Jurisdiction extended to the Industrial Relations Commission to receive VISs in cases relating to offences against Division 1 or Part 2 of the *Occupational Health and Safety Act 2000* (NSW);
- 2003 – Victims or victims' representative permitted to read a VIS aloud to the court;
- 2006 – Expansion of the definition of family victim to include the deceased's fiancé, grandchild and grandparent.

NSW sentencing court to take account of VISs from family victims in the determination of penalty in homicide matters?

#### IV ALTERNATIVE APPROACHES TO THE USE OF VICTIM IMPACT STATEMENTS FROM FAMILY VICTIMS IN SENTENCING HOMICIDE OFFENDERS

As noted above, NSW is alone in its approach to VISs from family victims. In considering the appropriateness of the NSW approach, it is necessary to explore the practice of other jurisdictions. Despite little uniformity in terminology and formal, procedural or evidential matters between the various Australian statutory models dealing with VISs, a common feature is that VISs from family victims are taken into account by the sentencing court in the formulation of penalty for homicide offenders.<sup>49</sup> Indeed, most common law jurisdictions such as Canada, New Zealand, the United Kingdom and the United States take account of VISs from family victims in sentencing.

It is a well accepted sentencing principle that the penalty imposed must be proportional to the objective seriousness of the offence. Offence seriousness is measured according to the culpability or blameworthiness of the offender and the harm caused by the offence. Accordingly, harm sustained by a victim as a result of an offence and foreseeable by the offender is a relevant factor to be taken into account in determining sentence.<sup>50</sup> How do sentencing courts in other jurisdictions take account of VISs from family victims without violating accepted sentencing principles? A review of alternative methods using VISs from family victims in sentencing in various jurisdictions reveals that there are two main approaches that have been broadly categorised as the specific impact approach and the generalised impact approach. These will be discussed in turn.

##### A The Specific Impact Approach

Following this approach, the sentencing court takes into account the specific harm sustained by individual family victims detailed in VISs submitted to the court. As noted, it is the approach that the NSW Supreme Court is most anxious to avoid. However, this seems to be the approach applied by sentencing courts in both South Australia and Western Australia as well as the United States.

Both South Australia and Western Australia have statutory models whereby family victims can submit a written and/or oral VIS to the sentencing court.<sup>51</sup> Section 24 of the Western Australian *Sentencing Act 1995* expressly provides that 'a victim ... may give a victim impact statement to a court to assist the court in determining the proper sentence for the offender'. In South Australia, the role

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49 *Sentencing Act 1995* (Victoria) s 95A; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1995* (WA) s 24; *Sentencing Act 1995* (NT) s 106B (4); *Sentencing Act 1997* (Tas) s 81A(2)(b); *Crimes (Sentencing) Act 2005* (ACT) s 49(1).

50 *Signato v The Queen* (1998) 194 CLR 656.

51 *Criminal Law (Sentencing) Act 1988* (SA) s 7; *Sentencing Act 1995* (WA) s 24.

of a VIS is not made explicit by legislation and sentencing courts take account of VISs by virtue of more general sentencing principles embedded in the legislation.<sup>52</sup>

In *R v Birmingham (No 2)*, the South Australian Supreme Court said that whilst it was ‘unquestionably right, not only as a philosophical proposition but for the purposes of the law, that courts should not put a greater value on one human life as opposed to another’, taking account of victim impact evidence from family victims did not represent a breach of this principle.<sup>53</sup> Rather, it was a question of perspective: ‘it is not a matter of valuing one life more than another ... it is a question of having regard to the totality of the “injury, loss or damage” which may include [that] suffered by “family victims”.’<sup>54</sup> However, the Court also noted that the offender was required to take the victim as he or she was and the penalty should reflect the extent of harm so caused to the victim. This reasoning seems to suggest that the greater the harm caused (a product of the value and worthiness of the deceased victim) the more severe the penalty to be imposed.

Sentencing courts in Western Australia have adopted a similar approach. The Western Australian Court of Criminal Appeal considered the rule in *Previtera* and its relevance to the role of VISs from family victims when sentencing a homicide offender in *R v Mitchell*<sup>55</sup>. In that case the Court said that ‘[p]lainly the tendency of a victim impact statement will ordinarily be to increase the sentence that otherwise would be imposed. In other words the facts disclosed in a victim impact statement are, in effect, aggravating circumstances’.<sup>56</sup> According to the Court, the combination of sections 13 and 24 of the Western Australian *Sentencing Act 1991* ‘removes the linchpin of the reasoning set out in *Previtera* and *Bollen*, and in my view the strictures expressed in these cases against the use of victim impact statements have no application in this State’.<sup>57</sup>

The United States Supreme Court has also grappled directly with this issue in the very different context of capital sentencing. Because it is the jury that hears sentencing submissions and decides whether the homicide offender will be executed, the submission of VISs from family victims has been a matter of

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52 Section 10 of the *Criminal Law (Sentencing) Act 1988* (SA) requires a court in determining a sentence for an offence to have regard to ‘the personal circumstances of a victim of the offence’ and ‘any injury, loss or damage resulting from the offence’. In a similar vein, see *Sentencing Act 1995* (NT) s 5(2) and *Penalties and Sentences Act 1992* (Qld) s 9(2).

53 (1997) 69 SASR 502, 548.

54 Ibid.

55 (1998) 104 A Crim R 523.

56 Ibid 531.

57 Ibid 533. Section 13 of the *Sentencing Act 1995* (WA) defines a victim as a member of the immediate family of the deceased where the offence results in death.

significant controversy in various US jurisdictions.<sup>58</sup> In *Booth v Maryland*,<sup>59</sup> the Court considered that victim impact evidence from family victims was inadmissible in capital cases because it did not relate to the culpability of the offender and there was a significant danger of an arbitrary and capricious result because of the prejudicial nature of such evidence: ‘we are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy.’<sup>60</sup>

However, this ruling was reversed in a newly constituted US Supreme Court some four years later in *Payne v Tennessee*.<sup>61</sup> In that case, the Court was of the view that such evidence was directly relevant to the offender’s culpability. According to the Supreme Court, taking account of VISs from family victims was not about promoting a comparison between deceased victims but ‘designed to show ... each victim’s “uniqueness as an individual human being”’.<sup>62</sup> Furthermore, the Court found that victim impact evidence is necessary to provide a counterbalance to the vast amount of mitigating evidence that is placed before the jury by the offender in such hearings. If victim impact evidence is excluded there is potential for unfairness because the victim gets no opportunity to talk about the impact of the offence whereas the offender can adduce a huge amount of mitigating evidence.

## B The Generalised Impact Approach

According to this approach, VISs from family victims are taken into account in sentencing as representative of the generalised impact of the killing on the community rather than evidence of the specific harm sustained by the individual family victim. Sentencing courts in Victoria, Tasmania and Canada appear to follow this approach.

Prior to legislative reform in 1995, the Victorian Court of Criminal Appeal in the 1994 decision of *R v Penn*,<sup>63</sup> found that evidence as to the impact upon the victim’s family of the victim’s death as a result of a culpable driving offence was not relevant to the formulation of sentence. During the course of its judgment the Court said ‘[i]t cannot be ... that a sentencing judge should be required to impose a harsher penalty upon an offender who caused the death of the person who is widely loved than upon one who causes the death of an unloved victim’.<sup>64</sup>

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58 See generally Susan Bandes, ‘Empathy, Narrative and Victim Impact Statements’ (1996) 63(2) *University of Chicago Law Review* 361; Donald Hall, ‘Victims’ Voices in Criminal Court: The Need for Restraint’ (1991) 28 *American Criminal Law Review* 233; Janice Nadler and Mary Rose, ‘Victim Impact Testimony and the Psychology of Punishment’; Lynne Henderson, ‘The Wrongs of Victims’ Rights’ (1985) 37 *Stanford Law Review* 937; Bryan Myers, Edith Greene, ‘The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy’ (2004) 10(4) *Psychology, Public Policy and Law* 494.

59 482 US 496 (1987)

60 482 US 496 (1987), 506 fn 8.

61 501 US 808 (1991).

62 Ibid 823.

63 (1994) 19 MVR 367 (‘Penn’).

64 Ibid 370.

However, shortly after this decision was handed down, the Victorian Sentencing (Victim Impact Statement) Bill 1994 (not discussed in *Penn*) was enacted. Section 1 of the Bill required sentencing courts 'to have regard to the impact of the crime upon the victim'. The Bill also inserted section 95A(1) into the *Sentencing Act 1991* (Vic) setting out the role of VISs in sentencing: 'a victim ... may make a victim impact statement to the court for the purpose of assisting the court in determining sentence.'

The status of VISs from family victims in the light of these legislative changes was considered by the Victorian Court of Criminal Appeal in *R v Miller*.<sup>65</sup> In that case, the Court found that 'evidence of sorrow and misery of a particular victim's family which was held to be inadmissible in *Penn* would now be admissible by way of a victim impact statement'.<sup>66</sup> As to the grounds of appeal, the Court said that the sentencing judge did not allow sympathy for the victim to loom so large that the sentencing discretion miscarried. Consistent with the reasoning in *Previtera*, the Court observed that 'it is still good law that a sentencing judge should not be required to impose a harsher penalty upon an offender who causes the death of a person who is widely loved than upon one who causes the death of an unloved victim'.<sup>67</sup>

Justice Vincent explained the role of VISs from family victims in homicide cases in *R v Beckett*.<sup>68</sup> His Honour said when sentencing the offender for murder:

The introduction of such statements was not, as I see it, intended to effect any change in the sentencing principles which govern the exercise of discretion by a sentencing judge. What such statements do is introduce in a more specific way *factors which a court would ordinarily have considered in a broader context*. They constitute a reminder of what might be described as the human impact of crime.<sup>69</sup>

This reasoning encapsulates the generalised approach and indicates how the Victorian sentencing courts are able to take account of VISs from family victims in sentencing in a way that is compatible with sentencing principles. As the Court said in *R v Swift*, 'victim impact statements are not to be used to produce a sentence which is unfair' or disproportionate in the circumstances of the case.<sup>70</sup> Given the nature of victim impact evidence, it is also evident that VISs from family victims are treated differently to other evidence in sentencing proceedings. In *DPP v DJK*,<sup>71</sup> Vincent J said (Batt and Eames JJA in agreement):

The statements provide an opportunity for those whose lives are often tragically altered by criminal behaviour to draw to the court's attention the damage and sense of anguish which has been created and which can often be of a very long duration. For practical purposes, they may provide the only such opportunity. Obviously the contents of the statements must be approached with care and understanding. It is not to be expected that victims will be familiar with or even attribute significance to the many considerations to which a sentencing judge must have regard in the determination of a just sentence in the particular case. Nor would it normally be

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65 [1995] 2 VR 348.

66 Ibid 354.

67 Ibid.

68 [1998] VSC 219.

69 Ibid 79 (emphasis added).

70 [2007] VSCA 52, [9] (Nettle JA).

71 [2003] VSCA 109.

reasonable or practicable for a sentencing judge to explore the accuracy of the assertions made.<sup>72</sup>

Whilst the statutory regime in Tasmania allows a family victim to submit a VIS to the court providing particulars of the effects on the victim of the commission of the offence,<sup>73</sup> there is no indication of the purpose of the VIS, nor are the Tasmanian sentencing courts explicitly directed to take account of the impact of the offence on the victim. However, at common law, with some reservations discussed below, the effect of the offence on family victims is clearly relevant to the sentencing court.<sup>74</sup>

Although not in the context of a death case, the Tasmanian Supreme Court has had occasion to consider the link between community outrage and the regard in which the deceased was held. Justice Zeeman said in *Inkson v R*: ‘To admit it as being relevant would give rise to the perception that punishment is to be governed by the value placed on a particular life rather than on human life in general’ and ‘this would be entirely contrary to principle.’<sup>75</sup> The Court further stated that: ‘Courts uphold the sanctity of life. They should not put greater value on one life rather than another or anything which may be so understood.’<sup>76</sup> In *Smith*,<sup>77</sup> VISs from family victims in a homicide case were considered relevant although, citing *Inkson*, the Court added the caveat that the prosecution should be cautious about the form and presentation of victim impact evidence before the court. Further, while the court said that regard was to be had to the ‘intense anguish’ suffered by the family of the deceased victim, ‘in cases of death, it is the taking of a life of a person not the regard in which the person was held which is the dominating factor’.<sup>78</sup>

The Canadian sentencing judgments also demonstrate use of the generalised impact approach. Section 722(1) of the Canadian *Criminal Code*, RSC 1985, c C-46, provides that ‘for the purpose of determining the sentence to be imposed on an offender ... the court *shall* consider’ victim impact evidence ‘describing the harm done to, or loss suffered by, the victim arising from the commission of the offence’. In circumstances where the victim of the offence is dead, ‘the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person, or is responsible for the care or support of that person or any dependant of that person’ may submit a VIS.

In *R v Labbe*,<sup>79</sup> the Supreme Court of British Columbia addressed the effects of VISs from family victims on sentencing homicide offenders and noted that the role of the victim impact evidence was not clear in the legislation.

It is not clear whether Parliament meant that judges must impose a more severe sentence than is usual for a particular crime if there is a victim’s impact statement,

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72 [2003] VSCA 109, [17].

73 *Sentencing Act 1997* (Tas) s 81A.

74 *Re Juan Carroll* [1998] 130 TAS 30 (Unreported, Underwood J, 31 July 1998); *Re Smith* [1997] 130 TAS 28 (Unreported, Slicer J, 17 June 1997) (*‘Smith’*).

75 (1996) 88 A Crim R 334, 357 (*‘Inkson’*).

76 *Ibid*.

77 *Re Smith* [1997] 130 TAS 28 (Unreported, Slicer J, 17 June 1997).

78 *Ibid* [9].

79 [2001] BCSC 123.

or a less severe sentence if there is not. Nor is it clear whether the more grievous the loss suffered by the victim, or the surviving family of the victim, the more severe the sentence should be.<sup>80</sup>

In sentencing the offender, the court began from the premise that a criminal offence is not an offence against the specific family victim harmed but rather a wrong against the community as a whole.<sup>81</sup> In addition, the Court stated that 'the law should recognise the equal value of every life that is taken'.<sup>82</sup>

The issue of the role of VISs from family victims was also addressed by the British Columbian Court in *R v Readhead*.<sup>83</sup> Beginning with the principle that sentencing serves the public interest, the Court continued:

[I]t would therefore be illogical to allow the individual response of the individual victim to impact on the nature of the sentence to any great degree. The criminal law, in effect, generalises the impact of what is, in essence, harm done to an individual. The sentence which results represents the power of the response of the community to the harm done to one of its members, and that response serves as protection for every member of the community. In this process, the law, of necessity, must reduce the focus on the individual circumstances of the victim. The loss of a life is the loss of a life. The sentence which results for a conviction for criminal negligence causing death must not vary where the life lost was an extraordinary one as opposed to an average one ... I am profoundly disturbed by any suggestion to the contrary. Judges who are bound to sentence such an offender do not measure the value of the life or lives lost and then adjust the sentence accordingly.<sup>84</sup>

Whilst the court did take account of the victim impact evidence, it was not as evidence of the specific harm suffered by the individual family victim. Rather the court treated the VISs as representative of the 'generalised sense of the consequences of the criminal act' which were then taken into account in sentencing.<sup>85</sup>

## V APPROPRIATENESS

It is argued that it is not appropriate to take VISs from family victims into account when sentencing homicide offenders using the specific impact approach. The ruling in *Previtera* remains compelling in this regard. However, it might be argued that the concerns of the NSW Supreme Court could be assuaged by taking account of VISs from family victims in sentencing using a generalised impact approach. Utilising this approach, VISs from family victims become one of the numerous factors that are taken into account by the sentencing judge in the determination of penalty.

Nonetheless, it is submitted that it continues to be inappropriate to take VISs from family victims into account in sentencing in NSW for two broad reasons. First, if *Previtera* is overruled, VISs from family victims will be relevant to the

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80 [2001] BCSC 123, [47].

81 Ibid [48].

82 Ibid [52].

83 [2001] BCPC 208.

84 Ibid [10].

85 Ibid [13].



question of whether harm to the individual family victim amounts to an aggravating factor under section 21A(2)(g) of the *CSPA*. Second, family victims are likely to be misled when told that their VIS will be relevant to sentencing. As primarily non-lawyers, most family victims would not understand the principles of sentencing that operate. In particular, those victims would not understand that their VIS was taken into account as representative of the generalised impact on the community rather than as evidence of the subjective, specific loss and suffering experienced by the victim.

### A 'Substantial Emotional Harm' as an Aggravating Factor

Section 21A(2)(g) of the *CSPA* provides that substantial 'injury, emotional harm, loss or damage caused by the offence' is an aggravating factor that the court is required to take into account in determining the appropriate sentence for an offence. Sub-section (4) limits the use to be made of the aggravating factors in section 21A(2) by providing that the sentencing court 'is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so'. Thus, the operation of section 21A(2)(g) is currently limited by the rule in *Previtera* and substantial emotional harm sustained by a family victim is not an aggravating factor in sentencing.<sup>86</sup> However, if *Previtera* is overruled, victim impact evidence from family victims could be used as evidence of substantial emotional harm and increase the penalty imposed on the homicide offender.

The NSW Court of Criminal Appeal has considered the circumstances in which emotional harm may be 'substantial' so as to amount to an aggravating factor. In relation to armed robbery, the Court in *R v Youkhana* found that substantial harm will be harm that is significantly more serious than that which any *ordinary person* would have suffered when subjected to this offence.<sup>87</sup> However, in this case the Court found that there was no evidence of substantial emotional harm. The Court also observed that such evidence would normally be put before the court in the form of a VIS (which had not been done in this case).<sup>88</sup> In *R v Solomon*,<sup>89</sup> another armed robbery offence, Howie J (Grove and Latham JJ in agreement) said that:

Because the court assumes, without evidence, that the victim of a robbery would be affected both physically and psychologically from the commission of the offence and because that consequence of the offence is taken into account generally in determining that the offence be considered as a serious one requiring condign punishment, it would be unfair for the court to take into account as an additional aggravating factor under s 21A(2)(g) the fact that the victim of an armed robbery suffered the type of harm that is assumed to be the case for any victim of that offence ... in order to take into account the effect upon the victim of the offence as an aggravating feature ... something more is required than that which the court has assumed to be the case.<sup>90</sup>

86 *R v Wickham* [2004] NSWCCA 193, [25].

87 *R v Youkhana* [2004] NSWCCA 412, [26].

88 *Ibid* [26].

89 [2005] NSWCCA 158.

90 *Ibid* [19].

Similarly, the sentencing court will also presume that victims of sexual offences will be likely to suffer psychological injury and emotional harm as a result of the offence.<sup>91</sup> Essentially then, to avoid double counting and unfairness, a sentencing court cannot take account of harm caused by the offence as an aggravating feature if that harm suffered would be expected to result from that particular offence.

In *R v Solomon*<sup>92</sup>, the NSW Court of Criminal Appeal explored the question as to what would constitute substantial emotional harm for a victim of an armed robbery. The Court considered academic literature and surveys and found that armed robbery is perceived as a life threatening situation for a majority of victims.<sup>93</sup> Moreover, the Court also noted that 'plainly the actual impact in each particular case will vary and, appropriately, cause variations in the sentence imposed'.<sup>94</sup> In this particular case, the Court found that the armed robbery offences were aggravated by the substantial harm suffered by the victims and demonstrated in their VISs.<sup>95</sup>

With regard to homicide offences, clearly the sentencing court will assume that the killing of the deceased will cause significant emotional and psychological distress to members of the deceased's family and the community at large. Whether or not the impact of the killing of the victim on the family victim as described in a VIS discloses 'substantial emotional harm' will depend upon the level of emotional harm that would ordinarily be sustained by a family victim in a homicide matter. Obviously, measuring such emotional harm would be fraught with difficulty. What is the level of emotional harm that an ordinary family victim will suffer? When will emotional harm suffered by a family victim be substantial? Inevitably it seems that such a determination will require comparisons between the experiences of family victims and the deceased victim: an unhappy task at best and one complicated by the different opportunities and abilities of family victims to express themselves.<sup>96</sup> In this regard, it is important to remember that VISs are not mandatory in NSW.<sup>97</sup>

Also problematic is the fact that evidence of this aggravating factor would be ordinarily provided to the court in the form of VISs from the family victims. Facts relied on as aggravating a particular offence must be established beyond reasonable doubt. As Wood CJ cautioned in *R v Berg*,<sup>98</sup> particular difficulties arise in NSW because VISs from family victims are unsworn and, although there

91 *R v Cunningham* [2006] NSWCCA 176, [53] (Bell J, with Simpson and Grove JJ in agreement). See also *Doolan v R* [2006] NSWCCA 29. In that case, Buddin J (McClelland and James JJ in agreement) said that 'there was evidence that the complainant was distressed but regrettably that was precisely what was to be expected. There was nothing however in the evidence to suggest that the harm was substantial' [24].

92 [2005] NSWCCA 158.

93 *Ibid* [96].

94 *Ibid* [95].

95 *Ibid* [20]. The details of the emotional and physical harm suffered by the victims are contained in the victim impact statements extracted in [11]-[12].

96 Tracey Booth, 'The Dead Victim, the Family Victim and Victim Impact Statements in NSW' (2004) 11(3) *Current Issues in Criminal Justice* 292, 303-304.

97 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29.

98 [2004] NSWCCA 300.

appears to be nothing in the *CSPA* to prevent it, the practice seems to be that victim-authors are not cross-examined about content.<sup>99</sup> Nor does section 30A, which allows victims to read their VIS aloud to the court, appear to envisage cross-examination.<sup>100</sup> Of course this is not say that a sentencing judge would refuse to allow a family victim to be cross-examined but even it were permitted, such cross-examination is likely to be tactically unwise for an offender who hopes to be regarded as remorseful. Further, there may be tactical advantage in not pursuing a cross examination. For instance, in the Northern Territory case of *Waye v R*<sup>101</sup> the trial judge afforded the offender credit for not cross-examining the victims over their VISs.<sup>102</sup>

These difficulties could be alleviated perhaps by making legislative provision for cross-examination as has been done in other Australian jurisdictions.<sup>103</sup> However as rightly pointed out by the Victorian Court of Criminal Appeal in *Dowlan*:<sup>104</sup>

[i]t would be quite destructive of the purpose of these statements if their reception in evidence were surrounded and confined by the sorts of procedural rules applicable to the treatment of witness statements in commercial cases. The reception of victim impact statements must, it seems to me, be approached by sentencing judges with a degree of flexibility; subject of course to the overriding concern that, in justice to the offender, the judge must be alert to avoid placing reliance on inadmissible matter.<sup>105</sup>

Furthermore, there is no doubt that such a cross-examination would be extremely distressing for family victims, particularly in cases where the offender is unrepresented, and it is more than likely that the practice would be viewed by the community at large as not facilitating justice. However, a failure to cross-examine could be seen as acceptance of what might be in the circumstances an excessive or exaggerated response with no recourse on appeal. In these circumstances, if it is found that VISs from family victims are relevant to the sentencing exercise, it may be that little weight can be given to this evidence. This conclusion is reinforced by Sperling J in *R v Slack*,<sup>106</sup> who said that substantial weight could not be given to an account of harm in an unsworn statement which was untested by cross-examination and ‘in the nature of things, far from being an objective and impartial account of the effect of the offence on the victim’.<sup>107</sup>

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99 Sentencing courts do have discretion to exclude inadmissible VISs or parts thereof if necessary. For example see *Sentencing Act 1991* (Vic) s 95B(2).

100 *R v Wilson* [2005] NSWCCA 219.

101 [2000] NTCCA 5.

102 *Ibid* [14].

103 For an example of such a provision, see *Sentencing Act 1991* (Vic) s 95D.

104 [1998] 1 VR 123.

105 *Ibid* 140.

106 [2004] NSWCCA 128.

107 *Ibid* [62].

## B Policy Concerns

From a policy perspective, a change in the law whereby VISs from family victims would become relevant to determination of penalty would or indeed should be regarded with great circumspection by Government and the courts. Dissatisfaction of crime victims with the criminal justice system has been well documented and current government policy actively seeks to remedy victim discontent, increase victim satisfaction with criminal justice processes and restore the dignity of crime victims.<sup>108</sup> Thus, important aims of VISs are increased victim satisfaction and greater cooperation of victims with criminal justice processes. Undoubtedly, in an era of much public complaint about sentencing,<sup>109</sup> governments are very keen to avoid statements from unhappy victims expressing dissatisfaction with criminal justice processes. Yet it may be that if family victims are informed that their VISs will be taken into account in sentencing, they could develop false expectations that the sentence imposed will reflect the magnitude of the harm that they perceive they have suffered and be disappointed when, in their view, it does not.<sup>110</sup>

Empirical research in various jurisdictions including Australia, Canada, the United States and the United Kingdom during the last 15 years suggests that VISs do not have significant effects on sentencing outcomes, nor on sentencing patterns generally.<sup>111</sup> Studies reveal that victims, who understand that the purpose of their VIS is to influence penalty, are disappointed when the sentence imposed does not match their expectations.<sup>112</sup> Unsurprisingly, crime victims generally do not understand that the sentencing court is required to take into account a myriad of factors in determining the penalty and that the individual circumstances of the offender and the offence dictate which factors are given more weight.

Currently, most family victims in NSW are advised that their VIS will not be taken into account in the formulation of a penalty<sup>113</sup> and the Homicide Victims Support Group ('HVSG'), the major support group for family victims of murder and manslaughter in NSW, supports this practice.<sup>114</sup> Although it is quite likely

108 Edna Erez, 'Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (2000).

109 For a summary of the relevant research see Julian Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (2003) 21-34.

110 This was the finding of the evaluation of the pilot VIS scheme in the United Kingdom. See Andrew Sanders, Carolyn Hoyle, Rod Morgan and Ed Cape, 'Victim Impact Statements: Don't Work, Can't Work' [2001] *Criminal Law Review* 447, 452.

111 Edna Erez et al, *Victim Impact Statements in South Australia: an Evaluation* (1994); Erez, above n 108; Julian Roberts, 'Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings' (2003) 47 *Criminal Law Quarterly* 365.

112 Erez, above n 108; Carolyn Hoyle et al, *Evaluation of the One-Stop-Shop and Victim Statement Pilot Projects* (1998); Edna Erez and Julian Roberts, 'Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' (2004) 10 *International Review of Victimology* 223.

113 Family victims are provided with information and support by the Witness Assistance Service of the NSW Office of the Director of Public Prosecutions. In addition, there is a memorandum of understanding between the NSW police and the NSW Homicide Victims' Support Group (HVSG) whereby, the police will refer family members of a deceased victim to the HVSG at a very early stage of the investigation. The HVSG provide family members with support, counselling and information.

114 Author's personal communication with Martha Jabour, Coordinator of the HVSG.

that family victims would want their VISs to influence the penalty, nevertheless, in the context of practice in NSW, it seems reasonable to conclude that family victims submit VISs to the sentencing process for other reasons such as therapeutic value and/or exercising the opportunity to have a voice.<sup>115</sup> However, should the law change and family victims expect that their VISs will be taken into account in sentencing, it may be that their expectations as to the degree of influence that their VISs could have on the penalty will be disappointed. The end result of such a change might well be dissatisfied crime victims and a further lack of public confidence in sentencing in homicide matters.

## VI CONCLUSION

So what role now for VISs from family victims in sentencing homicide offenders in NSW? It is submitted that section 3A(g) of the *CSPA* neither does, nor was intended to, change the law with respect to the role of VISs from family victims in sentencing homicide offenders. In any event, given that the VIS provisions are unchanged, the question remains: is it *appropriate* to take account of VISs from family victims in the sentencing of homicide offenders?

The arguments in *Previtera*<sup>116</sup> and *Dang*<sup>117</sup> to the effect that it is inappropriate for the court to take account of VISs from family victims are most compelling. To reiterate, the major concern is that by taking account of specific victim impact evidence from individual family victims, the court will be involved in a process of evaluating personal characteristics of the deceased. The more valuable and worthy the deceased victim, the greater the harm sustained by the family victim, the greater the harm caused by the offence and the greater the penalty that will be imposed. Conversely, the less valuable and worthy the deceased is judged, then the less harm will be caused by the offence and the more lenient the penalty imposed. According to the NSW Supreme Court, such a result would breach principles requiring equality before the law and jeopardise the integrity of the sentencing process.

No doubt, to a large extent, the Supreme Court's concerns could be addressed by taking account of victim impact evidence using the generalised approach. However, it is contended that it remains inappropriate to take account of VISs from family victims. First, the Supreme Court's concerns about evaluating the worthiness of the deceased victim remain valid when using victim impact evidence to determine whether a family victim has sustained 'substantial' emotional harm. Second, significant policy issues arise if family victims understand that their VIS will be relevant to the determination of penalties.

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115 The author is currently engaged in a research project interviewing family victims about their experiences submitting a VIS. Preliminary findings indicate that most family victims submit a VIS to have a voice and be heard by both the sentencing court and the offender. This would certainly be consistent with research findings in other jurisdictions. See Sanders, Hoyle, Morgan and Cape, above n 110, and the results of the recent evaluation of the Scottish pilot VIS programme reported in James Chalmers, Peter Duff and Fiona Leverick, 'Victim Impact Statements: Can Work, Do Work (For those who bother to make them)' [2007] *Criminal Law Review* 360.

116 (1997) 94 A Crim R 76.

117 [1999] NSWCCA 42.

Public confidence in the sentencing process and the legal system generally are of great importance to this debate.

Thus, the proper conclusion is that VISs from family victims should not be taken into account when sentencing homicide offenders. However, this conclusion is not a call that VISs from family victims be rendered inadmissible in the sentencing process; only that such evidence not be taken into account for the purposes of determining penalty. Victim impact statements are a well-entrenched feature of the sentencing landscape in homicide cases in NSW and properly so. The opportunity to submit a VIS is clearly welcomed by family victims in NSW as a mechanism by which victims can be heard and participate in the sentencing process. Undoubtedly, as has been argued convincingly elsewhere, VISs serve important expressive and communicative functions in the sentencing process and remain a significant opportunity for participation by crime victims.<sup>118</sup> Family victims should be able to enjoy this right of participation in the criminal justice process that is afforded by VISs without jeopardising the integrity of the sentencing process.

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118 Erez and Roberts, above n 112; Tracey Booth, 'Homicide, Family Victims and Sentencing: Continuing the Debate about Victim Impact Statements' (2004) 15(3) *Current Issues in Criminal Justice* 253.